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Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted]36

WALTER N. AHO,
Petitioner,

v.

CHRISTINA JACOBSEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIRST CIRCUIT

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Blanchard Printing Company, Boston, Mass. — Law Printers

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIRST CIRCUIT

To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Petitioner, Walter N. Aho, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit (hereto appended and marked Appendix A), affirming a directed verdict of the District Court of the United States for the District of Massachusetts dated and entered May 2, 1957, after the close of petitioner's case (R. 72-73).

I.
Opinions Below

The opinion of the District Court (R. 72-74) does not appear in the Official Reporter and the opinion of the Court of Appeals for the First Circuit is reported in 249 F.2d 309. Both of these opinions are hereto appended and marked Appendix B and Appendix C respectfully. A petition for a Rehearing was denied by the Court of Appeals without any written opinion (R. 108).

II.
Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit sought to be reviewed was dated and entered on November 22, 1957 (Appendix A).

The jurisdiction of the district court was based on a maritime action involving questions of Federal Law and also upon the required jurisdictional amount and was conferred by Act of June 25, 1948, C. 646, 62 Stat. 930, 28 U.S.C. sec. 1331; *Doucette* v. *Vincent*, 1st Cir., 194 F.2d 834.[1] The jurisdiction of the court below was based on an Act of June 25, 1948, C. 646, 62 Stat. 929, 28 U.S.C. sec. 1291.

The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by Act of June 25, 1948, C. 646, 62 Stat. 928, 28 U.S.C. sec. 1254(1) and by Act of June 25, 1948, C. 646, 62 Stat. 961 as amended May 24, 1949, C. 139, sec. 106, 63 Stat. 104, 28 U.S.C. sec. 2101(c).

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[1] The respondent's brief in the court below at page 2 states, "There is no jurisdictional question involved," and since *Doucette* v. *Vincent*, supra, is the law of the First Circuit, the case at bar if brought in a state court could be removed by the respondent to a federal court.

III.
Questions Presented

In an action under the general maritime law to recover for personal injuries received while boarding an inboard fishing vessel docked alongside of a wharf in the port of Fairhaven, Massachusetts (navigable waters) brought by a crew member of an outboard fishing vessel docked abreast of the said inboard vessel and while en route to his outboard vessel which was about to sail under circumstances where the said crew member had an undoubted right to cross and recross the inboard vessel for access to his outboard vessel created by both necessity and long established custom and usage of the fishing industry and where both of the said fishing vessels were business invitees of the wharfinger, an independent third party, the questions presented for determination by this Court are as follows:

A. What is the standard of the maritime law for determining the duties owed to the petitioner in this common maritime situation unique to the common law? This involves the following subsidiary questions:

1. Is the law to be fashioned to the particular facts of this maritime situation unique to the common law or is the petitioner to be fitted into some rigid category of the common law applicable to occupiers and property owners (licensee and a variety of invitees) with predetermined rights even though neither the category nor the rights suit the particular facts?

2. What, if any, of the said various rigid categories of the common law (licensee, bare invitee, invitee with a community of interest, business invitee) has the maritime law adopted?

3. In what of the said various categories adopted by the martime law is a crew member of an outboard vessel who has an undoubted right to board and cross an inboard vessel for access to his outboard vessel?

4. Regardless of the category adopted by the maritime law into which the petitioner is fitted, what is the duty of an inboard vessel with respect to providing and maintaining reasonably safe and proper access to an outboard vessel for crew members of said outboard vessel?

B. Even if the maritime law adopts the various rigid categories of the common law with its various respective duties as known to the common law, was there sufficient evidence to submit to the jury the issue as to whether the petitioner was such an invitee to whom was owed a duty to exercise due care to maintain the inboard vessel in a reasonably safe and proper condition for access to the outboard vessel?

C. Where the wharf is open to all vessels for business purposes and has provided ladders for safe movement between the inboard vessel and the wharf, does not the inboard vessel, a business invitee of the wharfinger, owe a duty of ordinary care to refrain from blocking use of the wharfinger's ladder to the petitioner, a business invitee of the wharfinger and a crew member of the outboard vessel?

D. Does an inboard vessel owe an absolute duty to maintain its vessel in a "seaworthy condition" for a crew member of an outboard vessel who has an undoubted right to cross the inboard vessel for access to his outboard vessel created by necessity and custom?

IV.
Statement of the Case

This is a common type of maritime case unique to the common law involving novel law affecting the entire fishing industry, smal' boating industry and all those who service said industries. Due to limited wharfage facilities in many of the ports in this country, there has developed both by necessity and long established custom and practice a habit of tying up fishing vessels and small craft alongside of each other with an undoubted right to board and cross intervening vessels for access to and from the outside vessel. However, in spite of the acknowledgment of the right to board and cross for access to the shore and back again to the outboard boat, the duties arising out of this situation have only been touched upon in a very few district court decisions and this case is the first appellate court decision on this very important subject.

The case was tried before Ford, J. and a jury. At the conclusion of petitioner's evidence, the respondent moved for a directed verdict. The Court ruled in favor of the respondent on the ground that at the time of the accident the status of the petitioner aboard the respondent's vessel was that of a mere licensee to whom the respondent owed no duty other than to refrain from wanton or reckless misconduct (R. 4, 72-73).

The evidence presented by the petitioner to establish a breach of a duty owed to him by the respondent at the time of the injury was as follows:

The petitioner is a fisherman of some ten years experience, working on scallopers out of the Port of New Bedford (R. 5). At the time of his injury, he was a member of the crew of the scalloper JOHN G. MURLEY, having first joined that vessel some time in March, 1954 and having made some twenty-five or twenty-six trips on her prior to

the happening of the accident (R. 6). The trip just prior to the accident ended shortly before Christmas of 1954, at which time the MURLEY unloaded her catch at New Bedford and then went to Fairhaven on the opposite side of the harbor where she tied up to another vessel at the Hathaway-Braeley wharf (R. 6).[2]

On January 4, 1955, at about 9 o'clock in the morning, petitioner came down to the Hathaway-Braeley Wharf with his sea bag in order to put it on the MURLEY which was due to go out that afternoon (R. 7). He found the MURLEY at the end of the pier alongside of the F/V CHRISTINA J. Both vessels were facing in a northerly direction and were tied up alongside each other—the CHRISTINA J. being tied directly to the wharf and the MURLEY being secured by lines to the CHRISTINA J. (R. 7-8, 89). There was located at the end of the Hathaway-Braeley Wharf, a ladder leading from the top of the wharf down toward the water (R. 10). At 9 to 9:30 on the morning of January 4, 1955, when petitioner came down to the pier with his sea bag, the CHRISTINA J. was lying in such a position that her forward starboard gallows frame[3] blocked this ladder (R. 10-11) and her position at 1:00 P.M. on that same day, aside from the fact that she was lower in the water, was the same (R. 56-58). This ladder was one of several ladders secured to the pier on its three sides and afforded access to any vessel tied up alongside it (R. 11, 49-50). There was ample room at the end of the pier for the CHRISTINA J. to have tied up in such a position so as to leave the ladder clear (R. 16-17, 89).

There was evidence that the end of the Hathaway-Braeley Pier slopes outward from the top of the pier

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[2] The respondent had no proprietary interest in the wharf.

[3] The gallows frame is a permanently fixed appliance on a fishing boat. It is shaped like an inverted V about 8 feet tall and tilts outboard of the rail (Plff's Ex. 6, R. 83).

toward the water so that there was, at the time of the petitioner's accident, a space of at least 2 feet between the pier and the rail of the CHRISTINA J. (R. 12, 37), and that the top of the rail was approximately three feet below the top of the pier (R. 9). Finding the pier ladder blocked, petitioner walked aft along the top of the pier to a point where he found the deck of the vessel to be clear of obstruction (R. 56) and then attempted to board the CHRISTINA J. at this point by leaning outward from the edge of the pier toward the vessel simultaneously stepping down and taking hold of a tackle rope, one end of which was secured to the rigging and the other end of which petitioner believed to be secured to a cleat on the winch housing. The tackle rope, however, was not secured to the cleat and as petitioner put his weight upon it, it went slack in his hand, causing him to fall onto the rail of the CHRISTINA J., and suffer fractures of the left lower leg (R. 12-13, 14, 15, 17, 23-24).

There was evidence that the custom and practice in the New Bedford fishing fleet was to secure all tackle lines and ropes whenever they were not in actual use, and that the lines and ropes would be secured in port as well as at sea (R. 50-51). There was evidence of a custom and practice to use ropes, tackle lines, rigging, gallows frames and other equipment and appliances that appear to be safe and secure as grab rails to hold while boarding fishing vessels (R. 53-55, 60-61). There was also evidence by a Mr. Harold Pierce, superintendent of the Hathaway-Braeley Wharf, that certain New Bedford vessels customarily tie up at that wharf; that if there is an empty space at the dock a boat will come alongside and tie up directly to the dock; that if all of the spaces at the dock are taken, an incoming boat will tie up to one of the vessels already there (R. 34-35). At times, as many as seven or eight vessels in a row have been tied up to each

other (R. 39). There was further evidence that the proprietors of this wharf make no charge for the privilege of tying up either to the wharf or to a vessel already moored there but that they sell ice and fuel and repair services to the vessels that come there to berth (R. 35). During the interval between the Christmas holiday of 1954 and January 4, 1955, the Hathaway-Braeley Wharf Company sold goods and services both to the CHRISTINA J. and to the JOHN G. MURLEY (R. 35-36). There was further evidence from this same witness that during the thirty-three years he has been associated with the fishing industry, he has observed that when fishing boats are tied up along side of one another, the fisherman belonging to the outside boats usually and customarily cross over the inside boats in order to reach their vessels, and that they reverse the procedure when going from their vessel back to the pier (R. 37-38). Indeed, this custom and usage arises out of necessity since the only means of access afforded to the outside boats from the pier is by crossing over the inside boats (R. 11, 37). Petitioner also testified to the same effect (R. 51-52, 63-64).

Hartigan, J., writing the opinion of the appellate court which affirmed the judgment for the respondent, held that the maritime law applies the common law categories of licensee and invitee to determine the nature of the duty owed by the vessel owner to the injured person in this type of situation. The court proceeded to hold that the trial court was correct in finding as a matter of law, that the petitioner was a licensee. Finally, the court held that, as a matter of law, there was no evidence warranting a jury finding that the respondent breached any duty owed to a licensee to refrain from wilful or wanton misconduct, or to use due care after discovering the licensee to be in

danger or refrain from exposing the petitioner to a known hidden peril.

Magruder, C.J., concurring, found that this Honorable Court has never decided the issue here involved and that this Court conceivably might determine the nature of the legal duty of an occupier in a situation governed by maritime law by a case by case determination in which the appropriate duty is fashioned to the particular facts, rather than attempt to force every fact pattern into established common law categories upon which the occupier's duty would be based. In the absence of a decision by this Honorable Court, Magruder C.J. concluded that the respondent's duty was limited to care in the conduct of dangerous activities and to make known hidden dangerous conditions of which the occupier is subjectively aware.

V.
Argument

A. With respect to the first question presented for review, namely what is the standard of the maritime law for determining the duties owed to the petitioner in this common maritime situation unique to the common law:

This Court has never decided what the standard of the maritime law is for approaching such a novel legal situation nor has it made any clear pronouncement adopting the rigid common law categories of licensee/invitee with its corresponding common law duties and incorporating them into the maritime law (*Leathers* v. *Blessing*, 105 U.S. 626).

This Court has often developed separate rules of law, distinct from the common law rules, where the situation was governed by the maritime law. (*The Max Morris*, 137 U.S. 1, 14-15) where contributory negligence was held not

to be a total defense to a maritime personal injury claim brought in the admiralty courts; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U.S. 372, 382-384 culminating in *Pope* v. *Talbot*, 346 U.S. 406, 408-411 where a maritime personal injury claim brought in a state court or federal law court was governed by the maritime law and the rule of proportionate damages; *The Osceola*, 189 U.S. 158, 175 culminating in *Mahnich* v. *Southern S. S. Co.*, 321 U.S. 94, 102-104 and in *Warren* v. *U. S.*, 340 U.S. 523, 529-530 wherein the court adopted both the rule of recovery by seamen for unseaworthiness without regard to the doctrine of assumption of the risk and the rule of recovery by seamen for cure and maintenance without regard to fault; *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 89-96 culminating in *Alaska S. S. Co.* v. *Petterson*, 347 U.S. 396, 401-402 where the court extended the doctrine of unseaworthiness to longshoremen even with respect to equipment brought on board by them; *Cox* v. *Roth*, 348 U.S. 207, 210 where the court said that the harsh rule of the common law against the survival of a tort action in the event of the death of a party had a 'slender basis' in the maritime law, noted its general demise even in common law jurisdictions and gave broad meaning to the intent of Congress to include a survival clause in the Jones Act even in the absence of Congressional language in the Act to interpret.

These decisions are recognized landmarks of the maritime law and display a liberality unequaled by the common law.

The proper approach in an unprecedented maritime case that affects a whole industry is to fit the law to the particular case and not attempt to squeeze the case into some rigid category of the common law with predetermined rights that developed from a sweeping effort of the early common law to protect landowners where here neither the category nor the rights suit the case. The concurring

opinion of Magruder, Chief Judge of the court below indicated a possibility of such an approach to the case by this Court (App. C, B, 28). In view of this Court's record of liberality in interpreting and expounding the maritime law, such an approach is more than a possibility. The following reasons require the suggested approach to this case:

The petitioner is a seaman and as a ward of the admiralty his interests and rights must be protected. (*Garrett* v. *Moore-McCormack Lines*, 317 U.S. 239, 246-247.) He was on business with the outboard vessel and was compelled to cross the inboard vessel because it occupied the inner berth and prevented him from carrying on his trade. His position differs from that of one who goes upon the premises of another with no compulsion for his own benefit and because of no act of the other requiring him to come upon the premises. Here the respondent places or permits her vessel to remain in a position that compels another to go upon it. She had no right to the inner berth except as such a right was conferred by the wharfinger. A whole industry has found it necessary to establish by custom and necessity a right to board and cross an inboard vessel for access to an outboard vessel.

The interests of the petitioner's employer (the outboard vessel) and of the wharfinger are furthered by placing responsibility for the maintenance of the inboard vessel upon the one in control of it and primarily to blame. Both the wharfinger and the petitioner's employer have a duty to provide reasonably safe and proper access to and from the outboard vessel. They certainly can inspect the inboard vessel, warn of hidden dangers and employ precautionary measures even though they may lack control of the inboard vessel. The only access to the outboard vessel was via the inboard vessel and they adopted said means of access to the outboard vessel. (*Vanderlinden* v.

Lorentzen, 2 Cir., 139 F.2d 995, 996-997. But see *Paul* v. *U. S.*, 3 Cir., 205 F.2d 38 and *Wheeler* v. *West India S. S. Co.*, 2 Cir., 205 F.2d 354, affirming 103 F.S. 631). Their responsibility, however, should be secondary and not primary in the interest of avoiding accidents.

The inboard vessel already owes a duty to its own crew members to maintain its vessel in reasonably safe and proper condition for boarding and access to the various parts of its vessel. Hence, to require it to maintain its vessel in reasonably safe and proper condition for access to crew members of outboard vessels is no enlargement upon its already existing duties.

Hartigan, J. who wrote the opinion of the court below held that he could find no clear authority indicating a duty on the part of the inboard boat to maintain its vessel in a reasonably safe and proper condition for boarding and access to an outboard boat. The case of *Anderson* v. *The E. B. Ward, Jr.*, 38 F. 44 (C.C.E.D. La. 1889) intimating such a duty contained a circumstance wherein the outboard boat had previously occupied the inner berth and gave it up to the outboard boat.[4] *Anderson* v. *Scully*, 31 Fed. 161 (So. Dist. N.Y. 1887) indicating a similar duty but without the additional circumstance contained in *Anderson* v. *The E. B. Ward, Jr.* was not discussed. *Lauchert* v. *American S. S. Co.*, 65 F. Supp. 703 (W.D.N.Y. 1946) a case involving large boats laid up for repairs in a ship yard with no custom to cross and recross did not seem to recognize the duty claimed by the petitioner. *Radoslovich* v. *Navigazione Libera Triestina*, S.A. 72 F.2d 367 (2 Cir. 1934) involved a crossing of an inboard vessel by one who

[4] This is the usual rule. The inner boat is to surrender the inner berth when it no longer requires it and another needs it for unloading or otherwise.

was clearly on business with the inboard vessel and therefore is not relied upon by the petitioner.

Hartigan, J. stated that in other types of maritime cases brought by persons other than shipowner's employees or employees of independent contractors hired by the shipowner, the courts have found it necessary to place the injured person in one of the common law categories of licensee/invitee to determine his rights and employed the common law duties for the said respective categories. He, therefore, proceeded to fit the petitioner into one of the rigid common law categories, considered him a licensee and gave him the rights afforded to a common law licensee, namely, to refrain from wilful and wanton misconduct, to use due care after discovering his peril and refrain from exposing himself from a known hidden peril.

This Court has made no clear pronouncement adopting the common law categories of licensee/invitee (*Leathers* v. *Blessing*, 105 U.S. 626) and although the said common law categories have been followed in maritime cases both in the district courts and the circuit courts of appeals (*Kermarec* v. *Compagnie Generale Transatlantique*, 245 F.2d 175, 177 (2 Cir. 1957) cert. granted, 669 Oct. Term, 1957;[5] *Rodermond* v. *U.S.*, 179 F.2d 955 (3 Cir. 1950), it cannot be said that the said categories are so firmly entrenched in the maritime law that they ought not to be swept aside and a single duty of reasonable care in all the circumstances be substituted. (*Kermarec* v. *Compagnie Generale Transatlantique*, supra, at 180 (dissenting opinion); 13 N.A.C.C.A. Law Journal, 19-26, "Some Thoughts About Stare Decisis"—Roscoe Pound.

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[5] *Hartigan J.* relied for authority on the *Kermarec* case, *supra*, wherein a divided Appellate Court considered a social quest of a seaman permitted by the shipowner to visit the seaman, a licensee. This Court granted certiorari. The case at bar falls in a similar category.

This is especially so when considering the disagreement among the cases and writers with respect to the number of classes of invitees (mere invitee, invitee with a community of interest and business invitee) and the difference in the duties owed to each of said classes. (*Kermarec* v. *Compagnie Generale Transatlantique*, 245 F.2d. 175, 180-182, cert. granted, 669 Oct. Term, 1957; compare: Prosser, "Business Visitors and Invitees", 26 Minn. L. Rev. 573 (1942) with Am. L. Inst., "Restatement of Torts." Sec. 329 et seq.)

B. With respect to the second question presented for review, namely, even if the maritime law adopts the various rigid categories of the common law with its various respective duties as known to the common law, was there sufficient evidence to submit to the jury the issue as to whether the petitioner was such an invitee to whom was owed a duty to exercise due care to maintain the inboard vessel in a reasonably safe and proper condition for access to the outboard vessel:

The answer to this question would depend in part on whether this Court will adopt the category of a mere invitee and extend to said person the duty to maintain the inner vessel in a reasonably safe and proper condition for access to the outboard vessel (*Kermarec* v. *Compagnie Generale Transatlantique*, 245 F.2d 175, 180-182, cert. granted, 669 Oct. Term, 1957; *The Daylesford*, 30 Fed. 633, 635, S. Dist. Ala. 1884.)

This Court has said that an invitation may be implied from custom (*Leathers* v. *Blessing*, 105 U.S. 626, 629 where a cotton broker who boarded a vessel to learn if there was a consignment of cotton for him in accordance with a custom of the port was considered an invitee to whom was owed a duty to exercise due care).

The positioning by the respondent of her vessel with knowledge of the necessity and the custom and practice of boarding and crossing an inboard vessel for access to an outboard vessel is an inducement on the part of the respondent to use her vessel for such purposes. (*Sweeney* v. *Old Colony & Newport Railroad Co.*, 10 Allen (Mass.) 368, 373-374, a common law case of inducement in a situation where the defendant's tracks were so prepared to appear to be a part of a public road; *Metallic Compression Casting Co.* v. *Fitchburg R. Co.*, 109 Mass. 277, 281-282,[6] a common law case where a fire in plaintiff's premises created **a property right** in the plaintiff to lay a fire hose on defendant's premises **by public license with a duty on defendant to exercise due care.)**

The right to board and cross the inner boat for access to the outboard boat was conferred on the petitioner by the wharfinger. The respondent had no right to the inner berth except on such terms and conditions as the wharfinger dictated. At the time the respondent's vessel took the inner berth there was in existence an old and long established custom to board and cross an inner boat for access to an outboard boat. The respondent took the inner berth subject to the custom. (*Sun Oil Co.* v. *Dalzell Towing Co., Inc.*, 55 F.2d 63, 64, (2nd Cir. 1932), aff'd, 287 U.S. 291; *The Mystic Terminal Co.* v. *Thibault*, 108 F.2d 813, 814 (1st Cir. 1940). Hence in this posture, the petitioner boards the inner boat upon consideration furnished by the wharfinger and is a business invitee of the respondent.

Where the positions of vessels in regard to the proximity to a wharf depend on the time of arrival and necessity for the inner berth (a distinct advantage for loading, unloading and major repairs) there is a community of interest be-

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[6] **This actually was a case involving active negligence but the court did not treat it as such. It is a classic case of a *property right created by a public license.***

tween fishing boat owners to extend to each other mutual rights to cross and recross whenever the occasion arises with reciprocal duties to maintain their vessels in reasonably safe and proper condition for said crossings. (*Silva* v. *Henry & Close Co.*, 279 Mass. 334, 336, a common law case where longshoremen looking for work in accordance with a custom were considered business invitees of the wharfinger because a ready supply of labor rendered their wharfage and dockage facilities more valuable.) Hence in this posture, the petitioner is an invitee with a community of interest to whom is owed the duty to maintain the vessel in reasonably safe and proper condition.

C. With respect to the third question presented for review, namely, the liability of the respondent, a business invitee of the wharfinger, to the petitioner, a business invitee of the wharfinger, for blocking the wharf's ladder (not a condition of the respondent's vessel) and thus requiring the petitioner to board in a more hazardous manner:

The common law duty of one business invitee to another business invitee or licensee is to exercise due care with respect to the rights of each other. (*Boutlier* v. *Malden*, 226 Mass. 479, 490; *Brosnon* v. *Gage*, 240 Mass. 113, 117). The basis of this duty is the refusal to impute the restrictions on liability possessed by the occupier or landowner to any other class. The rules that developed with an overzealous desire to protect interests in land will not be applied to an invitee who is neither the owner nor has a proprietary interest in the premises so as to limit his duty to another invitee using the premises. (*Sarna* v. *American Bosch Magneto Corp.*, 290 Mass. 340, 345-6; *Harper & James*, "The Law of Torts", (1956) Vol. II, sec. 27.2. A similar case in a common law setting is *Smith* v. *August A. Busch Co. of Massachusetts, Inc.*, 329 Mass. 615, 621, where-

in a business invitee of a restaurant was held liable to another invitee for negligently leaving a trap door open at a place sometimes used by invitees for access to the restaurant.)

The petitioner as a business invitee of the wharfinger had a right to use the wharf ladder and the respondent by permitting her vessel's forward gallows to block the said ladder, when it could have prevented it, denied him the use of the said ladder (R. 10-11, 56-58, 16-17, 89). This resulted in the petitioner's using a more dangerous method of boarding (R. 56) and was a factor in the happening of the accident (*N.Y., N.H. & H. R. Co.* v. *Leary* (1st Cir.) 204 F.2d 461, 465-467). Even if the ladder were the ship's ladder, the petitioner had a **property right to use it conferred by public license** and the respondent could not negligently interfere with its use. (*Metallic Compression Casting Co.* v. *Fitchburg R. Co.*, 109 Mass. 277, 281-282, *Hentz* v. *Toppin*, 322 Mass. 333, 335, where the court said **there is a remedy for negligently obstructing a right of way resulting in personal injury.**)

D. With respect to the fourth question presented for review, namely, whether an inboard vessel owes an absolute duty to maintain its vessel in a seaworthy condition for crew members of an outboard vessel:

This Court has made no clear pronouncement with respect to extending the doctrine of unseaworthiness beyond workmen laboring on the respondent's vessel (*Seas Shipping Company* v. *Sieracki*, 328 U.S. 85, 95-96; *Pope* v. *Talbot*, 346 U.S. 406, 412-413). The doctrine could well be extended to crew members of an outboard vessel who have an undoubted right to cross and recross the inboard vessel for access to their outboard vessel created by both necessity and custom. The same policy reasons that dic-

stated this Court's decisions in *Seas Shipping Company* v. *Sieracki*, 328 U.S. 85, 95-96 and in *Pope* v. *Talbot*, 346 U.S. 406, 412-413 apply equally to the petitioner in this case. The absolute duty imposed on the vessel owner to keep his vessel in a seaworthy condition will require him to use the utmost care to perform said duty and the vessel owner is in a better position to bear the loss. Since the vessel owner is already obliged to provide a seaworthy vessel for his own crew members and workmen, there would be no enlargement upon his already existing duties.

Conclusion

Certiorari should be granted because in a common type of maritime case unique to the common law and involving novel maritime law affecting the entire fishing and shipping industries, the court below, because of lack of precedent, felt obliged to apply and in fact misapplied the rigid common law categories of licensee/invitee with their respective narrow and harsh duties to an unprecedented maritime case where neither the category nor the duty suited the case and contrary to the liberality of the maritime law as expounded by this Court.

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Appendix A

JUDGMENT.

November 22, 1957.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) ROGER A. STINCHFIELD
Clerk.

Appendix B

OPINION OF THE DISTRICT COURT

The Court: There was one other aspect of this case—before I let you go today—that was explained to you by counsel for the plaintiff. We had another case we were trying with this case, and I explained it rather briefly to you. It was a separate suit for what is called a cure and maintenance by the plaintiff. That will be disposed of by the Court. You probably will not hear of this case again, so I can tell you what happened to that case.

It is agreed that the plaintiff here, as a result of this injury, was laid up for something like 159 days. He was entitled to his board and room and his medical expenses under the claim for cure and maintenance, and that amounted all [126] together—the medical bills and the 159 days at $6 a day—he will be awarded by the Court and judgment entered for the sum of $1,301.75. The plaintiff will get that.

You see, in a suit for cure and maintenance, the seaman is injured in the service of the ship. Whether there is any fault or liability on the part of the shipowner at all, he is entitled under the Admiralty Law to what they call cure and maintenance, that is, his medical expenses, and also his board and room while he is convalescing under the administrations of medical care. And in this case he didn't go back to work for 159 days, and counsel have agreed that is the period he was entitled to board and room, and also medical expenses he incurred during that period. That is awarded to him without any fault on the part of anybody else. But you can see on the other case with respect to what we call the indemnity count here, where I have directed a verdict, he couldn't recover in this case unless he proved that the defendant shipowner was

guilty of wilful, wanton, or reckless misconduct. Under the ruling of the Court he was a licensee. If he were an invitee, if through an express or implied invitation he was invited to use that particular crossover, then he could recover if he proved that the defendant shipowner, or its officers or agents, were guilty of simple negligence, as distinguished from wanton, wilful, or reckless conduct. They are different kinds entirely, not different degrees of negligence, but different kinds of conduct.

Appendix C

United States Court of Appeals
For the First Circuit

No. 5268.

WALTER N. AHO,

PLAINTIFF, APPELLANT,

v.

CHRISTINA JACOBSEN,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

William H. Diamond, with whom *Harry Kisloff* was on brief, for appellant.

James A. Whipple for appellee.

OPINION OF THE COURT

November 22, 1957.

HARTIGAN, *Circuit Judge*. This is an appeal from a judgment of the United States District Court for the District of Massachusetts directing a verdict for the defendant shipowner in an action brought by the plaintiff for damages for personal injuries allegedly suffered because of the defendant's negligence.

The plaintiff at the time of his injury was a crew member of the fishing vessel "John G. Murley" and had been a fisherman of some ten years experience. On January 4, 1955 the "John G. Murley" was scheduled to leave the New Bedford harbor in the afternoon. The plaintiff testified that about nine o'clock in the morning he put his bag on board

the vessel and then returned to his home. It appears that at this time and also later on at one o'clock on the same day when plaintiff was injured, the "John G. Murley" was facing north and tied alongside the defendant's fishing vessel, the "Christina J." The latter boat was alongside the pier. It was necessary in going from the pier to the "John G. Murley" to cross the deck of the "Christina J." There was testimony that it was a customary practice for fishermen from the outside boats to cross over the inside boats in going back and forth from ship to pier. Plaintiff returned to the pier about one o'clock in the afternoon and attempted to board the defendant's vessel in order to cross to the "John G. Murley". However, the rail of the "Christina J.", because of the lowness of the tide was now three feet below the top of the pier and there was a space of two feet between the end of the pier and the side of the boat. Plaintiff seized a tackle rope on the "Christina J." running from a block on the mast to another block attached to the rigging. Unfortunately, the end of this tackle rope was not secured to a cleat and as the plaintiff put his weight on it, it went slack and he fell upon the rail of the "Christina J." and suffered fractures of the lower left leg. There was evidence that a ladder attached to the pier was blocked by the starboard gallows frame of the "Christina J." and, therefore, was not available for use by the plaintiff. There was also evidence that it was customory to secure and make fast all tackle lines when fishing vessels were laying over in port.

The district court ruled that the plaintiff was a licensee to whom was owed only a duty to abstain from wilful, wanton or reckless misconduct, and there being no evidence of such misconduct on the part of the defendant, a verdict was directed for the defendant.

The plaintiff in this appeal contends that he had a maritime right to cross from the inboard boat in order to reach

his boat and that the defendant had an affirmative duty to keep her boat in a reasonably safe condition for the plaintiff's passage. The plaintiff further contends that he was a business invitee, to whom was owed a duty of exercising due care.

We must treat the plaintiff's complaint alleging damages resulting from defendant's negligence as one involving a maritime tort. The plaintiff's right of recovery is rooted in federal maritime law. *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953); *Leathers* v. *Blessing*, 105 U.S. 626 (1881). Massachusetts law is, therefore, not controlling in this case.

Plaintiff contends that a seaman who is forced to cross an inboard vessel in order to reach a pier is owed a duty of reasonable care by the owner of the inboard vessel. There is language in *Anderson* v. *The E. B. Ward, Jr.*, 38 F. 44 (C.C.E.D. La. 1889) to the effect that the master and owner of the inboard vessel owe a duty to members of the outboard vessel to see that they are not injured in crossing the inboard vessel because of the negligence of the master. In that case, however, the defendant's vessel took the inside berth previously occupied by the plaintiff's vessel and this was one of the circumstances which the court held created a duty of reasonable care. There was no evidence in the instant case that the "Christina J." had taken an inboard position away from the "John G. Murley" and the cases are perhaps distinguishable on this ground. The decision in *Lauchert* v. *American S.S. Co.*, 65 F. Supp. 703 (W.D.N.Y. 1946) does not seem to recognize this maritime right on the part of members of outboard vessels. It held that a member of the crew of an outboard vessel was as to the owner of an inboard vessel a mere licensee to whom was owed only a duty to refrain from wilfully injuring him or knowingly allowing him to run into danger.

In other recent cases involving maritime tort actions,

alleging unsafe conditions aboard the shipowner's vessel, brought by persons other than the shipowner's employees or employees of independent contractors hired by the shipowner, it has been found necessary to determine whether the plaintiff was a licensee or invitee. This preliminary finding has been required in order to ascertain what standard of care is owed to the injured person. Thus in *Kermarec* v. *Compagnie Generale Transatlantique*, 245 F.2d 175 (2 Cir. 1957), it was held that a guest of a member of the defendant's crew was a mere licensee. See also *Rodermond* v. *U.S.*, 179 F.2d 955 (3 Cir. 1950); *Gunnarson* v. *Robert Jacob, Inc.*, 94 F.2d 170 (2 Cir. 1938), cert. denied 303 U.S. 660 (1938); *Radoslovich* v. *Navigazione Libera Triestina, S.A.*, 72 F.2d 367 (2 Cir. 1934), and *Zanone* v. *Oceanic Steam Navigation Co.*, 177 Fed. 912 (2 Cir. 1910). Although it has been suggested that there is a trend toward holding an owner of property to a single duty of reasonable care in all circumstances, see *Kermarec* v. *Compagnie Generale Transatlantique*, supra at 180 (dissenting opinion), the general rule as stated by the court in that case at p. 178 "is that the shipowner shall not wilfully or wantonly injure a licensee, or expose him to hidden perils or fail to use due care to prevent injury to him after discovering that he is in danger."

Prior to discussing whether the defendant here was guilty of wilful misconduct or failed to apprise the plaintiff of a hidden peril or neglected to use due care after discovering the licensee to be in danger, it is necessary to determine whether evidence was presented from which it could be found that plaintiff was a business invitee rather than a licensee. It is argued that plaintiff and defendant had a community of interest in that very possibly defendant's vessel might on occasion be in an outside position and it would be to the economic benefit of the owner for her crewmen to be able to cross the decks of the inboard boat.

The extension of the status of business invitee to those who are on premises at a certain time for their own purposes and not for the purpose of having business dealings with the property owner has been widely accepted in certain circumstances. Usually, however, these cases concern premises open to the public such as shops where there is at least the present economic benefit to the owner of giving the invitee the opportunity of seeing and perhaps forming a desire for some of the wares on display. *Renfro Drug* v. *Lewis*, 149 Tex. 507, 235 S.W.2d 609, 23 A.L.R.2d 1114. In the instant case, plaintiff had no intent to do business with the defendant at any time in the future and, conversely, there is no indication that defendant could obtain any present or potential economic benefit from the plaintiff. The trial court was correct when it held that the plaintiff was a licensee as a matter of law.

The trial court also ruled correctly when it held that there was no evidence from which a jury could infer that the defendant had been guilty of wilful or wanton or reckless misconduct toward the plaintiff. However, in order to sustain the lower court's decision we must also find that from the evidence presented by the plaintiff a jury could not reasonably find that defendant had either exposed the plaintiff to a hidden peril or failed to use due care after discovering the licensee to be in danger. There is no evidence here that defendant failed to use due care after discovering the licensee to be in danger for there was no proof offered by the plaintiff that defendant was aware of the plaintiff's reliance on the slack tackle rope in boarding the "Christina J." In *Canadian National Railway Company* v. *Conley*, 226 F.2d 451 (1 Cir. 1955), this court dealt with the exposure of a licensee to a hidden peril. While I disagreed with the majority of the court with regard to the law in New Hampshire concerning the exposure of a licensee to hidden perils, I agree that in states other

than New Hampshire there has been a more general acceptance of the principle of law as stated in that case that the property owner is subject to liability to gratuitous licensees only if he knows of the condition causing the harm, and subjectively realizes that the condition involves an unreasonable risk to such licensees and has reason to realize that such licensees would not discover the condition or realize the risk and yet, notwithstanding this, invites or permits the licensees to enter or remain upon the premises, without exercising care either to make the condition reasonably safe or to warn licensees of the condition and the risk involved therein. There was no evidence presented here that the defendant or her agents or employees were aware of the existence of the slack rope or that it represented a danger to any licensees crossing the deck of defendant's vessel. The same can be said of the presence of the gallows frame in such a position as to prevent use of the ladder. Moreover, if it be conceded that the gallows frame had been interposed by the defendant so that it became an obstacle to the plaintiff's passage across the "Christina J.", its presence was certainly obvious to him. It could not be said to be an unsafe condition, which he could not be expected to be aware of unless warned by the defendant.

As the plaintiff has not presented evidence from which a jury could find that the defendant violated the limited standard of care which she owed to the plaintiff as a licensee, the decision of the district court in directing a verdict for the defendant was correct.

An order will be entered affirming the judgment of the district court.

MAGRUDER, *Chief Judge* (concurring). The court's opinion is quite right in ruling that the applicable law in this case is federal maritime law, of which the Supreme Court of the United States is necessarily the ultimate expositor. Therefore, we need not be concerned with the Massachusetts cases, which seem to say that where an occupier merely permits a person to enter the premises for his own convenience, the occupier owes such person no duty other than a duty to refrain from intentional or willful and wanton injury. Cf. *Murphy* v. *Boston & Maine R.R.*, 248 Mass. 78 (1924).

Since the general maritime law is being constantly enriched by common law analogies (see *Jansson* v. *Swedish American Line*, 185 F.2d 212, 217 (C.A. 1st, 1950)), it may be that the Supreme Court will adopt, as part of the general maritime law, the categories of trespasser, licensee, and business visitor, with differently defined duties with respect to each, as laid down in Am. L. Inst., Restatement of Torts § 329 *et seq.*

On the other hand, the Supreme Court conceivably might regard this approach as putting the cart before the horse. Instead of first determining plaintiff's status on the premises by reference to a few rather rigid categories, with the occupier's obligation predetermined once the plaintiff's status is settled, the Supreme Court might insist upon looking at the special facts of the particular case so as to fashion a duty on the occupier's part appropriate to the case. Thus, it is conceivable that the Supreme Court would say that, in the very unique fact situation presented in the case at bar, the owner of the CHRISTINA J owed to seamen crossing her decks to reach a contiguous vessel the same duty of care to furnish a reasonably safe place to work, including a reasonably safe mode of exit and ingress, as the owner of the CHRISTINA J owed to members of the crew of the latter vessel.

But I know of no Supreme Court decision pointing to the foregoing conclusion. In the absence of such controlling authority it seems to me that, having in view the customs of the trade, the most that could be inferred from the facts of the case at bar would be that the CHRISTINA J permitted her deck to be used as a convenient crossing place whereby persons could reach a contiguous vessel; that persons so crossing her deck were there for no purpose directly or indirectly serving the business interests of the CHRISTINA J; that the duty of the occupier in such a case could be no greater than a duty of care in the conduct of dangerous activities, and a duty of care to make known to such bare licensees any dangerous conditions of the premises of which the occupier is subjectively aware, and of which the occupier has reason to believe may not be discovered by the licensee himself. See Restatement of Torts §§ 341, 342.

Since there is no evidence from which it could be inferred that the defendant violated the duty so defined, I concur in the judgment of the court.

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MAR 27 1958
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 36

WALTER N. AHO,
PETITIONER,

v.

CHRISTINA JACOBSEN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF

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In the
Supreme Court of the United States

OCTOBER TERM, 1957

No. 790

WALTER N. AHO,
PETITIONER,

v.

CHRISTINA JACOBSEN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF

I.
Opinions Below

The opinion of the Court of Appeals for the First Circuit is reported in 249 F 2d 309.

II.
Questions Presented

In an action under the general maritime law to recover for personal injuries received while boarding an inboard fishing vessel docked alongside of a wharf in the Port of Fairhaven, Massachusetts (navigable waters) brought by a crew member of an outboard fishing vessel docked abreast of the said inboard vessel and while enroute to his outboard vessel which was about to sail under circumstances where the said crew member had an implied permission to cross and recross the inboard vessel for access to his outboard vessel created by custom and usage of the fishing industry, the questions presented for determination by this Court are as follows:

I. Whether the analogy of the common law applicable to licensees and business invitees can be properly applied to the general maritime law for determining the duties owed to the petitioner by the inboard vessel owner.

II. Whether the petitioner falls within the category of a licensee or business invitee of the respondent.

III. Whether the Doctrine of unseaworthiness is to be extended to a licensee.

III.
Argument

A. With respect to the first question presented for review, namely, Whether the analogy of the common law applicable to licensees and business invitees can be properly applied to the general maritime law, the general maritime

law is being constantly enriched by common law analogies (See *Jansson* v. *Swedish American Line*, 185 F2d 212, 217 (C.A. 1st 1950)). Also, state wrongful death acts have been applied to the maritime law. See *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 42 S Ct. 89. Also, see *Spencer Kellogg & Sons, Inc.* v. *Hicks*, 285 U.S. 502, 52 S Ct. 450.

Certainly the maritime law may be enriched by analogies from common law especially where there is no material prejudice to the characteristic features of the general maritime law. The maritime law indeed has already recognized and applied the common law analogy of business-invitee and licensee in maritime situations as the basis of liability.

BUSINESS INVITEE:

Leathers v. *Blessing*, 105 U.S. 626
Hendricksen v. *H. Roberts and Son*, 1947 AMC 1349
The Carnia, 72 Fed. (2) 367, 1935 AMC 111
The Silverado, 31 Fed. (2) 22
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LICENSEE:

Lauchert v. *American S.S. Co.*, 67 Fed. Supp. 703, 1946 AMC 1381
The Nimbus, 94 Fed. (2) 170, 1938 AMC 132
Apostolou v. *S.S. Eugenia*, 1938 AMC 995
Kermarec v. *Compagnie Generale Transatlantique*, 245 F.2d. 175, 177, (2 Cir., 1957), cert. granted 669 Oct. Term, 1957

B. With respect to the second question, namely, Whether the petitioner falls within the category of a licensee or business invitee of the respondent.

Invitation may be express or implied. In the instant case there is no evidence as to express invitation. To con-

stitute implied invitation, there must be some inducement or allurement on the part of the owner of the premises, or there must be some mutuality of interest to which the visitor's presence relates. In other words, there must be some direct connection between the visitor's presence and the business of the owner of the premises.

Plummer v. *Dill*, 156 Mass. 426
Silva v. *Henry & Close Co.*, 279 Mass. 334
Lauchert v. *American S. S. Co.*, 1946 AMC 1381

The beneficial interest to the owner of the premises must have some direct business or commercial significance.

License is implied when the object of the entry is the convenience or benefit to the one entering the premises with no benefit to the owner of the premises.

The respondent contends that the following two decisions follow the established rule of this Court in following the common law analogies of licensee and business invitee in establishing the duties of the inboard ship owner.

In *Anderson, Adms.* v. *Scully*, 31 Fed. 161, the issue was the liability of a vessel owner to a seaman of an outboard vessel crossing an inboard vessel by a devious route over the deck. The Court spoke of an implied license to cross and approved of the general rule in its only cited decision of *Sweeney* v. *Old Colony R.R. Co.*, 10 Allen (Mass.) 368. There was no reference to an invitation.

In *Anderson* v. *The E. B. Ward, Jr.*, 38 Fed. 44, it is to be noted that the two vessels, inboard and outboard, had changed positions while at the dock. Furthermore the Court made a direct finding that the master of the then inboard vessel had invited the crew of the Marmion to cross. No evidence in relation to the invitation is reported in the decision but it seems reasonable to believe that there must have been some basis for the direct finding of fact.

Examination of *Leathers* v. *Blessing*, 105 U.S. 626, discloses a business invitee status of the plaintiff. And in *The Daylesford*, 30 Fed. 633, the Court stated that the plaintiff custom officer was aboard connected with the cargo which would establish his status as a business-invitee.

The decision of *Lauchert* v. *American S.S. Co.*, 65 Fed. Supp. 703, 1946 AMC 1381 is more in point. Here the plaintiff's ship was moored outside of the defendant's ship. Gangplanks between the two vessels had been rigged by a repair company. Plaintiff while using the gangplank fell and was injured and sued the owner of the inboard vessel for failure to supply access. The Court held that the plaintiff was not an invitee in that he was not on the defendant's premises at the request or invitation of the defendant, nor in connection with any business of the defendant.

The distinction between licensee and invitee is well pointed out in *Hayes* v. *Boston Fish Market Corp.*, 319 Mass. 556 and *Pereira* v. *Gloucester Community Pier Asso., Inc.*, 318 Mass. 391.

The petitioner argues that the positioning by the respondent of her vessel with knowledge of the necessity and the custom and practice of boarding and crossing an inboard vessel for access to an outboard vessel is an inducement on the part of the respondent to use her vessel for such purposes. Even if she had this knowledge which the evidence in the case does not disclose this would not be an inducement but a mere permissive act and permission is not an inducement or an allurement and it is clear that to constitute an implied invitation there must be some mutuality of interest to which the visitor's presence relates.

The petitioner further argues that the respondent has the duty as a business invitee of the wharfinger to the petitioner as a business invitee of the wharfinger since one business invitee owes another business invitee the duty of due care. However, this argument ignores the fact that the

petitioner was not a business invitee as to the respondent but a mere licensee injured upon the respondent's property and that the blocking of the ladder related only to access to the respondent's property.

It is clear from the facts that the petitioner is a mere licensee as to the respondent and cannot at the same time occupy another position in relation to the respondent.

It is also clear from the evidence in the case that the respondent was not guilty of wilful, wanton or reckless misconduct toward the petitioner, nor was there any evidence that the respondent had exposed the petitioner to a hidden peril or failed to use due care after discovering the petitioner to be in danger. There was no evidence that the respondent or her agents or servants were aware that there was a slack rope in the rigging of the "Christina J" and indeed there is no evidence that the respondent was aware the petitioner was going to or did rely on a slack tackle rope.

C. On the third question, namely, whether the doctrine of unseaworthiness is to be extended to a licensee, this Court has so far confined its extension of the doctrine of unseaworthiness to those persons who are performing some duty on the vessel concerned for the benefit of said vessel. It would seem unwise to extend the doctrine to those who go aboard the vessel for their own purposes and for purposes not connected with any benefit to the owner of the vessel. Certainly the duty already exists on the outboard vessel to provide safe access for its own crew members and there is no need to extend the doctrine for the benefit of those crew members to an inboard vessel.

There exist now in the general maritime law the categories of crew members, longshoremen, business invitees, licensees and trespassers or wrong doers. The general maritime law has heretofore considered members of the

crew as wards of the Admiralty Court. The doctrine of unseaworthiness has been extended to cover longshoremen working aboard various vessels. What the petitioner asks here is an elimination of the categories amongst persons who go on ships. It would seem that to eliminate these categories would result in eliminating the theories under which crew members have been protected by the Courts and would make the vessel owner an insurer as to any class of person going aboard his ship. Certainly this would materially prejudice the already established characteristic features of the maritime law.

IV.

Conclusion

Certiorari should not be granted because the Court should not disturb the doctrines already established and since to do so would materially prejudice the characteristic features of the general maritime law.

Respectfully submitted,

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